TAN SRI DATO' (DR) ROZALI ISMAIL & ORS v. CHUA LAY KIM & ORS

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
ROHANA YUSUF JCA
PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-244-02-2015]
30 DECEMBER 2015

CIVIL PROCEDURE: *Judgment – Setting aside – Judgment sum – Restitution – Whether judgment sum deposited into firm's client's account – Whether trustee acted in accordance with terms of trust deed when trust fund disbursed – Whether solicitor and trustee liable to account for monies disbursed from judgment sum – Whether solicitor's bill for professional fees genuinely made – Whether solicitor's fees issued from trust monies – Whether judgment sum disbursed without authorisation – Whether plaintiffs deprived of judgment sum – Whether defendants aware of plaintiff's right of restitution – Whether constructive trust existed – Whether trial judge rejected circumstantial evidence*

CIVIL PROCEDURE: *Judgment – Setting aside – Judgment sum – Restitution – Principle of – Whether status quo of parties restored to position prior to impugned judgment being granted – Whether court seized with inherent jurisdiction to restore parties to status quo ante*

TRUSTS: *Trusts – Trust deed – Validity of – Whether genuinely made – Whether trustee acted in accordance with terms of trust deed – Whether duties and discretion of trustee delegable – Conduct of parties – Whether trustee maintained account for trust fund – Whether constructive trust existed – Whether trustee acted in concert with other defendants to deprive plaintiffs from receiving judgment sum – Whether trustee acted unconscionably*

EVIDENCE: *Circumstantial evidence – Nature of – Consideration by trial court – Whether direct evidence scrutinised against circumstantial evidence – Whether circumstantial evidence strengthened plaintiffs' case – Whether trial judge solely relied on documentary evidence – Whether appellate interference warranted*

The second respondent ('the second defendant') was an advocate and solicitor and a consultant of the third respondent ('the third defendant'), a firm of advocates and solicitors ('the firm'). The first respondent ('first defendant') was the wife of the second defendant and the fourth respondent ('fourth defendant') was a partner in the firm. The firm represented one George Lim in the Kuala Lumpur High Court Suit No. S-22-1180-2007 ('the 2007 suit'). George Lim obtained a judgment against the appellants ('the plaintiffs') in the 2007 suit for the sum of RM23,413,034.65. At the time the decision was delivered, George Lim was already a bankrupt and subsequently, adjudged as suffering from mental disorder under the provisions of the Mental Health Act 2001. Dissatisfied, the plaintiffs lodged an appeal against the 2007 suit.

A As a condition of an interim stay of execution, the judgment sum together with accrued interest was deposited with a stakeholder, Messrs Zul Rafique & Partners in RHB Bank (KLCC branch). Subsequently, the plaintiff's application for stay of execution was dismissed and on 1 March 2011, the judgment sum together with the accrued interest amounting to B RM35,087,135.06 was released to the firm's client's account specially opened by the fourth defendant at the same RHB Bank (KLCC branch). *Vide* a deed of trust prepared by the firm, the fifth defendant purportedly acted as a trustee for George Lim for the release of the judgment sum. On 2 March 2011, the whole sum of RM35 million was withdrawn and a sum of RM3.5 C million was disbursed. The balance sum was transferred to the firm's client's account with Public Bank Bhd ('PBB account'). Among others, it was argued that the bill issued for professional fees amounting to RM7,600,000 was false. Further, a certain amount of the trust monies was paid to the first defendant as orally authorised by the second defendant. On 7 July 2011, the D Court of Appeal allowed the plaintiffs' appeal against the decision in the 2007 suit and the court ordered a restitution of the judgment sum to the plaintiffs. The plaintiffs then filed a claim in the High Court against the defendants to hold them liable for the release of the judgment sum or alternatively, to hold them liable to account for monies received by each of them. The trial court, however, ruled in favour of the defendants by E deciding, *inter alia*, that (i) the plaintiffs relied on the wrong basis, *ie*, *lis pendens* to establish a claim for breach of constructive trust and unjust enrichment against the defendants; and (ii) the fifth defendant acted in accordance with the terms of the trust deed when he disbursed the trust fund. Hence, this appeal. In challenging the validity of the trust deed and bill for F professional fees, it was contended that the trust judge failed to judicially appreciate the totality of the evidence before the court.

Held (allowing appellants' appeal; setting aside decision of the High Court)

Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:

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(1) The trial judge preferred the documents of trust and the bill as evidence and rejected the circumstantial evidence relied by the plaintiffs to impeach the validity of these documents. The trial judge had misdirected herself in doing so. Circumstantial evidence are good evidence and sometimes, it can be better than direct evidence. The H trust deed and the bill should in fact be scrutinised against the circumstantial evidence adduced before the court. (paras 18 & 28)

(2) *Vide* cl. 2.3 of the trust deed, the trust was to take effect the moment the monies came into the firm's client's account. Following the I express term of cl. 2.3, the trust deed should take effect from the date the monies went into effect on 1 March 2011, *ie*, upon receipt of the judgment sum by the settlor or solicitor. The allegation that the trust deed only took effect when the monies were moved into the firm's

PBB client's account showed that either cl. 2.3 was a mere dead letter or that the defendants were acting in violation of the said clause and were seeking an *ex post facto* justification for what they did to rationalise an otherwise irrational explanation. If cl. 2.3 was a dead letter, it followed that the trust deed was *prima facie* a sham and was never intended to be the document it was supposed to be. (paras 23 - 25)

(3) The subsequent conduct of the parties in relation to the trust deed further reinforced an inference of a sham trust. The fifth defendant, although familiar with the duties of a trustee, did not maintain an account of the trust fund. The trustee alone had the power and discretion to make an investment. The duties and discretion of a trustee are non-delegable. If there was a trust deed, the fifth defendant would have to exercise his own discretion and not act under dictation. Further, the trust monies returned by George Lim's children upon his request did not run in tandem with the existence of a trust because a trust, once completely constituted, was irrevocable in the absence of such a power in the trust instrument. (paras 27 & 28)

(4) An allegation of sham puts into doubt the intention of the parties. There would be no necessity for a separate action to challenge the validity of the trust deed. It would not be possible to obtain any direct evidence to proof that the trust deed was a sham. The only possible direct evidence would be merely available through the confession of the very people who were acting in concert against the plaintiffs. Hence, the plaintiffs had to inevitably depend on circumstantial evidence to prove their case. On the facts, the evidence surrounding *albeit* circumstantial, was indeed overwhelming to point to a sham trust. The judge misdirected herself in preferring written document to the circumstantial evidence because it was abundantly clear that there was no intention to create a trust but to justify the pay out. (paras 29 - 31)

(5) The trial judge failed to consider the evidence circumstancing the bill for professional fee in holding that it was genuine. The format of the bill did not conform to the format of all the other bills issued by the firm. The firm issued from its client's account the amount billed and the payment was made in favour of the first defendant on the oral instruction of the second defendant. It was strange that the fees of such a magnitude could end up in the hands of the first defendant. The facts of this strange transaction were well within the knowledge of the first defendant. The court had been deprived of any positive evidence as to why such strange arrangement had been made over a bill of professional charges. This also supported a lack in the genuineness of the impugned trust deed. (paras 32, 35 & 36)

(6) Although the first defendant may be entitled not to testify in the trial, she would be in peril of having an adverse inference drawn against her since the circumstances required her explanation. In certain circumstances, a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue. If such inference was drawn, it strengthens the evidence adduced by the other party. In light of the circumstantial evidence raised by the plaintiffs, the absence of the witnesses would strengthen the plaintiffs' case on the facts and circumstances of this case. (paras 35 & 37)

(7) The speed of pay out and the conduct of the defendants viewed as a whole had succeeded to impeach the genuineness of both the trust deed and the bill. The trial judge ought to have taken the exercise of scrutinising these evidences against the written documents. Since the crux of the whole defence had placed total reliance for the various payments solely on the strength of these impugned documents, the plaintiffs had been wrongfully deprived of the judgment sum. All the defendants were engaged in the dissipation of the monies. The firm, where both the second and fourth defendants were members, prepared the sham trust deed as well as the impugned bill. Both these documents had expedited the speed by which the monies moved. The single largest beneficiary of the monies, ie, the first defendant, could not have received all the monies but for the acts of the second and fourth defendants. Further, the fifth defendant had been lackadaisical of his function as a trustee and exercised no control whatsoever over the trust. He was also a party to the disbursement of the monies by authorising vouchers. These conducts proved that they were all in cahoots to deprive the plaintiffs of their monies. Hence, the defendants were acting in concert with each other and should be held liable for the wrongful loss perpetrated on the plaintiffs. (paras 38 - 40)

(8) When a judgment is set aside, the court must put right the position of the parties by ordering restitution. The *status quo* of parties must be restored to the position prior to the impugned judgment being granted. The court is seized with inherent jurisdiction to restore parties to *status quo ante*. As such, the judgment sum would be ordered to be refunded to the plaintiffs. Restitution can only be ordered against the party to the judgment, *ie*, George Lim. George Lim was, however, a bankrupt and suffered from mental disorder. It would be a fruitless exercise to order George Lim to pay the judgment sum. Therefore, the successful plaintiffs must proceed directly against any third party, which the plaintiffs had done in this case. (paras 41 - 43)

(9) The bill for professional fees showed that it was essentially for the second defendant's counsel fees. This bill was purportedly paid from the proceeds of the judgment sum lying in the trust account of the firm.

Based on the principles of unconscionability, the second defendant and the firm had been aware of the right of restitution as the second defendant was counsel in this case. However, the bill appeared to have been settled with undue speed. Being the client, George Lim, who had not met the first defendant or knew her, was the only person who could have authorised the firm to issue payment in the manner that it was issued and therefore, his testimony was essential to the case. However, George Lim was not called to give evidence. The irresistible conclusion to be drawn was that the payment of the said bill was for the predominant purpose of defeating the plaintiffs' right of restitution. (paras 48 - 51)

(10) The whole exercise was driven by the firm and the second defendant would have been aware of the plaintiffs' right of restitution. The learned trial judge had in fact misdirected herself in finding that there was no concrete and satisfactory evidence to make any conclusive finding, based on the suspicion of the plaintiffs. The plaintiffs' case was grounded on the evidence of oral and documentary and not pivoted on mere suspicion. By failing to consider the totality of the evidence which points to the unconscionable conduct, the trial judge had misdirected herself, which calls for appellate intervention. As such, it would be unconscionable to allow the first and second defendants to benefit from receipt of this payment. (paras 51, 53 & 54)

Bahasa Malaysia *Headnotes*

Responden kedua ('defendan kedua') adalah peguam dan perunding di firma responden ketiga ('defendan ketiga'), sebuah firma peguam cara dan peguam bela ('firma tersebut'). Responden pertama ('defendan pertama') ialah isteri defendan kedua dan responden keempat ('defendan keempat') merupakan rakan kongsi firma tersebut. Firma tersebut telah mewakili George Lim dalam guaman sivil no. S-22-1180-2007 di Mahkamah Tinggi Kuala Lumpur ('guaman 2007'). George Lim telah memperolehi penghakiman terhadap perayu-perayu ('plaintif-plaintif') dalam guaman 2007 untuk jumlah RM23,413,034.65. Semasa keputusan diberikan, George Lim telah muflis dan selepas itu didapati mengalami gangguan mental di bawah peruntukan Akta Kesihatan Mental 2001. Tidak berpuas hati, plaintif-plaintif memfailkan rayuan terhadap guaman 2007. Sebagai syarat penangguhan pelaksanaan interim, jumlah penghakiman bersama-sama faedah yang diperolehi didepositkan dengan pemegang amanah, Tetuan Zul Rafique & Partners di Bank RHB, cawangan KLCC. Permohonan plaintif untuk penangguhan pelaksanaan ditolak dan pada 1 Mac 2011, jumlah penghakiman bersama-sama faedah yang diperolehi berjumlah RM35,087,135.06 dipindahkan ke akaun anak guam firma yang dibuka khas oleh defendan keempat di Bank RHB yang sama, di cawangan KLCC. Melalui surat ikatan amanah yang disediakan oleh firma tersebut, defendan

A kelima bertindak sebagai pemegang amanah George Lim untuk pengeluaran jumlah penghakiman tersebut. Pada 2 Mac 2011, keseluruhan jumlah RM35 juta telah dikeluarkan dan jumlah sebanyak RM3.5 juta dibayar keluar. Baki jumlah dipindah ke akaun anak guam firma tersebut di Public Bank Bhd ('akaun PBB'). Antara lain, dihujahkan bahawa bil yang dikeluarkan untuk
B yuran guaman berjumlah RM7,600,000 adalah palsu. Selanjutnya, sejumlah wang amanah tersebut dibayar kepada defendan pertama atas kebenaran lisan defendan kedua. Pada 7 Julai 2011, Mahkamah Rayuan telah membenarkan rayuan plaintif-plaintif terhadap keputusan yang diberikan dalam guaman 2007 dan mahkamah memerintahkan restitusi jumlah penghakiman kepada
C plaintif-plaintif. Plaintif-plaintif kemudian memfailkan tuntutan di Mahkamah Tinggi terhadap defendan-defendan supaya mereka bertanggungjawab atas pengeluaran jumlah penghakiman ataupun secara alternatif, supaya mereka bertanggungjawab terhadap wang yang diterima. Mahkamah bicara, walau bagaimanapun, memutuskan berpihak pada
D defendan atas alasan, antara lain, bahawa (i) plaintif-plaintif telah bergantung kepada dasar *lis pendens* secara salah untuk membuktikan kemungkiran amanah konstruktif dan kekayaan tidak adil terhadap defendan-defendan; dan (ii) defendan kelima bertindak mengikut terma-terma surat ikatan amanah apabila dia membayar dana amanah tersebut. Oleh itu, rayuan ini. Dalam mencabar kesahihan surat ikatan amanah dan bil yuran guaman, dihujahkan
E bahawa hakim bicara gagal menilai secara kehakiman kesemua keterangan yang dikemukakan.

Diputuskan (membenarkan rayuan perayu-perayu; mengetepikan keputusan Mahkamah Tinggi)

F **Oleh Abdul Aziz Abdul Rahim HMR menyampaikan penghakiman mahkamah:**

(1) Hakim bicara lebih memihak pada dokumen-dokumen amanah dan bil sebagai keterangan dan menolak keterangan ikut keadaan yang disandarkan oleh plaintif-plaintif untuk mencabar kesahihan
G dokumen-dokumen tersebut. Hakim bicara tersalah arah apabila mengambil langkah tersebut. Keterangan ikut keadaan adalah keterangan baik dan kadang-kala, lebih baik daripada keterangan langsung. Sepatutnya, surat ikatan amanah dan bil diteliti bersama-sama dengan keterangan ikut keadaan yang dikemukakan di mahkamah

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(2) Melalui kl. 2.3 surat ikatan amanah, amanah mula berkuat kuasa apabila wang disalurkan ke dalam akaun anak guam firma. Mengikut terma nyata kl. 2.3, surat ikatan amanah sepatutnya berkuat kuasa dari tarikh wang dimasukkan pada 1 Mac 2011, iaitu, selepas penerimaan
I jumlah penghakiman oleh peguam cara. Alasan bahawa surat ikatan amanah hanya berkuat kuasa apabila wang dipindah ke dalam akaun anak guam firma di PBB menunjukkan bahawa sama ada klausa 2.3

berkuatkuasa ataupun defendan-defendan menentang klausa tersebut dan menuntut justifikasi *ex post facto* terhadap apa yang dibuat untuk mewajarkan penjelasan yang tidak masuk akal. Jika klausa 2.3 tidak boleh dikuatkuasakan, maka, surat ikatan amanah adalah *prima facie* palsu dan tidak berfungsi sebagai dokumen sebenar.

(3) Tindakan seterusnya pihak-pihak berkenaan surat ikatan amanah memberi inferens suatu amanah yang dibuat secara penipuan. Defendan kelima, walaupun mengetahui tugasan seorang pemegang amanah, tidak menyimpan penyata untuk dana amanah tersebut. Hanya seorang pemegang amanah mempunyai kuasa dan budi bicara untuk membuat pelaburan. Tugasan dan budi bicara seorang pemegang amanah tidak boleh diagihkan. Jika terdapat surat ikatan amanah, defendan kelima perlu melaksanakan budi bicaranya dan bukan mengikut arahan orang lain. Tambahan lagi, wang amanah yang dipulangkan oleh anak-anak George Lim atas permintaannya tidak selari dengan kewujudan amanah kerana amanah, apabila diwujudkan, tidak boleh dibatalkan tanpa kuasa sebegitu dalam instrumen amanah.

(4) Tuduhan kepalsuan memberi keraguan terhadap niat pihak-pihak. Tiada keperluan untuk memulakan tindakan berasingan untuk mencabar kesahihan surat ikatan amanah. Mustahil untuk memperolehi sebarang keterangan langsung untuk membuktikan bahawa surat ikatan amanah dibuat secara palsu. Satu-satunya keterangan langsung boleh diperoleh melalui pengakuan sesiapa yang bertindak bersama menentang plaintif-plaintif. Oleh itu, plaintif-plaintif terpaksa bergantung pada keterangan ikut keadaan untuk membuktikan kes mereka. Berdasarkan fakta, keterangan sekeliling walaupun mengikut keadaan, menjurus pada amanah yang dibuat secara penipuan. Hakim bicara tersalah arah apabila beliau memilih dokumen bertulis dan bukannya keterangan ikut keadaan kerana jelas tidak terdapat niat untuk mewujudkan amanah tetapi untuk membuat bayaran keluar.

(5) Hakim bicara gagal mempertimbangkan keterangan berkenaan bil yuran guaman dengan memutuskan bahawa ia bukan palsu. Format bil tidak sama dengan bil-bil lain yang dikeluarkan oleh firma. Firma tersebut telah mengeluarkan jumlah yang dinyatakan dalam bil dari akaun anak guamnya dan bayaran tersebut dibuat kepada defendan pertama atas arahan lisan defendan kedua. Pelik apabila jumlah yuran sebegitu diberi kepada defendan pertama. Defendan pertama mempunyai pengetahuan mengenai transaksi yang bukan biasa ini. Tiada apa-apa keterangan positif dikemukakan di mahkamah berkenaan pengaturan yang bukan biasa terhadap bil yuran guaman tersebut. Ini juga menyokong kesahihan surat ikatan amanah tersebut.

(6) Walaupun defendan pertama berhak tidak memberi keterangan anggapan bertentangan boleh dibuat terhadapnya memandangkan keadaan memerlukan penjelasannya. Dalam sesuatu keadaan, mahkamah boleh membuat anggapan bertentangan atas ketidakhadiran seseorang saksi yang boleh memberi keterangan material berkenaan sesuatu isu. Jika inferens sebegitu dibuat, ia akan memperkuatkan keterangan yang dikemukakan oleh pihak yang satu lagi. Berdasarkan keadaan ikut keterangan yang dibangkitkan oleh plaintif-plaintif, ketidakhadiran saksi-saksi boleh menguatkan lagi kes pihak plaintif atas fakta dan keadaan kes ini.

(7) Cara bayaran yang dibuat dengan cepat dan kelakuan defendan-defendan secara keseluruhannya berjaya mencabar kesahihan surat ikatan amanah dan bil yuran guaman. Hakim bicara sepatutnya meneliti keterangan-keterangan ini bersama-sama dengan dokumen-dokumen bertulis. Memandangkan pihak defendan telah membuat beberapa bayaran keluar berdasarkan dokumen-dokumen tersebut, pihak plaintif telah dinafikan jumlah penghakiman. Semua defendan terlibat dalam pengagihan wang tersebut. Firma, di mana defendan-defendan kedua dan keempat merupakan rakan kongsi, telah menyediakan surat ikatan amanah palsu dan bil tersebut. Kedua-dua dokumen ini telah mempercepatkan perjalanan wang yang dikeluarkan. Penerima yang menerima kebanyakan wang tersebut, iaitu, defendan pertama, tidak mungkin menerima kesemua wang itu tanpa perbuatan defendan-defendan kedua dan keempat. Tambahan lagi, defendan kelima tidak mengendahkan tugasnya sebagai pemegang amanah dan tidak mengawal wang amanah. Dia juga salah seorang pihak dalam pengagihan wang tersebut dengan mengeluarkan baucer. Kelakuan ini menunjukkan bahawa mereka bertindak bersama dalam menafikan plaintif-plaintif akan wang mereka. Oleh itu, defendan-defendan bertindak bersesama satu sama lain dan sepatutnya bertanggungjawab atas kehilangan yang dialami oleh pihak plaintif.

(8) Apabila penghakiman diketepikan, mahkamah perlu memastikan pihak-pihak berada dalam kedudukan yang betul dengan mengarahkan restitusi. *Status quo* pihak-pihak perlu dikembalikan kepada keadaan sebelum penghakiman diberikan. Mahkamah mempunyai bidang kuasa mengembalikan pihak-pihak ke *status quo ante*. Oleh itu, jumlah penghakiman diperintahkan untuk dipulangkan kepada plaintif-plaintif. Restitusi hanya boleh diperintahkan terhadap pihak kepada penghakiman, iaitu, George Lim. George Lim, walau bagaimanapun, telah muflis dan mengalami gangguan mental. Tiada makna memerintahkan George Lim membayar jumlah penghakiman tersebut. Oleh itu, pihak plaintif yang berjaya perlu mengambil tindakan terhadap sebarang pihak ketiga, seperti dibuat oleh plaintif-plaintif dalam tindakan ini.

(9) Bil yuran guaman menunjukkan bahawa tujuannya adalah untuk yuran defendan kedua. Bil ini dibayar daripada jumlah penghakiman yang dimasukkan ke dalam akaun amanah firma tersebut. Berdasarkan prinsip ketidakadilan, defendan kedua dan firma mempunyai pengetahuan mengenai hak restitusi memandangkan defendan kedua adalah peguam dalam tindakan ini. Walau bagaimanapun, bil tersebut telah dijelaskan dengan segera. George Lim, yang merupakan anak guam dan tidak pernah berjumpa atau mengenali defendan pertama, merupakan satu-satunya pihak yang boleh mengarahkan firma tersebut untuk membuat bayaran dalam cara ia dikeluarkan dan oleh itu, keterangannya penting dalam kes ini. Walau bagaimanapun, George Lim tidak dipanggil untuk memberi keterangan. Kesimpulan yang tidak boleh disangkal adalah bayaran untuk bil tersebut dibuat untuk menafikan hak plaintif-plaintif untuk restitusi.

(10) Segala pelaksanaan dibuat oleh firma tersebut dan defendan kedua sedar akan hak restitusi plaintif-plaintif. Hakim bicara tersalah arah dalam memutuskan bahawa tidak terdapat keterangan munasabah untuk membuat penemuan, berdasarkan keraguan plaintif-plaintif. Kes pihak plaintif adalah berdasarkan keterangan lisan dan dokumentar dan bukannya kerana disyaki. Atas kegagalan mempertimbangkan keseluruhan keterangan yang menjurus kepada kelakuan tidak adil, hakim bicara telah tersalah arah yang mewajarkan campur tangan rayuan. Oleh itu, tidak adil untuk membenarkan defendan-defendan pertama dan kedua mendapat keuntungan daripada penerimaan bayaran ini.

Case(s) referred to:

Bank of Credit and Commerce International (Overseas) Ltd v. Akindele [2000] 4 All ER 221 ***(refd)***

CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals [2014] 3 CLJ 1 FC ***(refd)***

Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors [2013] 5 CLJ 949 FC ***(refd)***

Malacca Malay Guru2 Co-operative Thrift & Loan Society Ltd v. Tan Mei Hua & Ors [1970] 1 LNS 77 HC ***(refd)***

Montagu's Settlement Trusts, Re, Duke of Manchester v. National Westminster Bank Ltd [1992] 4 All ER 308 ***(refd)***

PP v. Sarjit Kaur Najar Singh [1998] 5 CLJ 609 HC ***(refd)***

Ranbaxy (Malaysia) Sdn Bhd v. E.I Du Pont Nemours & Co [2012] 9 CLJ 79 CA ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Tong Soon Tiong & Ors v. FA Securities Sdn Bhd [2013] 2 CLJ 448 FC ***(refd)***

Vijay Kumar Arora v. State (NCT of Delhi) [2010] 2 SCC 353 ***(refd)***

Wisniewski v. Central Manchester Health Authority [1998] PIQR 324 ***(refd)***

Other source(s) referred to:

Snell's Equity, 32nd edn, p 672, paras 22-051, pp 806 to 807

A *For the appellants - Gopal Sri Ram (Teh Boon Eng, Fadzilah Mohd Pilus, CK Lim & David Yii with him); M/s Teh & Assocs*
For the 1st, 3rd & 4th respondents - David Mathews (Prakash Lachimanan, Tina Francis & Malarvily Perumal with him); M/s Mathews Hun Lachimanan
For the 2nd respondent - Krishna Dallumah (Yong Yoong Hui with him); M/s Krishna Dallumah, Manian & Indran
B *For the 5th respondent - Jagjit Singh Gill; M/s Putra Gill*

[Editor's note: For the High Court judgment, please see Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Chua Lay Kim & Ors [2015] 4 CLJ 807 (overruled)]

Reported by Kumitha Abd Majid
C

JUDGMENT

Abdul Aziz Abdul Rahim JCA:

[1] This is an appeal by the appellants (the plaintiffs before the High
D Court) against the decision by the High Court at Kuala Lumpur which dismissed the plaintiffs' claim against each of the respondents (the defendants before the High Court). The learned High Court Judge found that the plaintiffs have failed to prove their case against each of the respondents on a balance of probabilities.

E **[2]** We heard the appeal on 4 August 2015 and to a continued hearing on 1 September 2015. Upon hearing the oral submissions of counsel and having read their written submissions and the relevant appeal records, we reserved our judgment to be delivered on a date to be fixed. This is our decision.

F **[3]** For convenience we will refer to the parties as how they were referred to at the High Court.

The Parties

[4] The first defendant is the wife of the second defendant. The second defendant is an advocate and solicitor and a consultant to the third defendant.
G The third defendant is a firm of advocates and solicitors ("the firm"). The fourth defendant is an advocate and solicitor and a partner in the firm. The firm represented Lim Pang Cheong @ George Lim in the Kuala Lumpur High Court Suit No. S-22-1180-2007 ("the 2007 suit"). The fifth defendant acted as a trustee for Lim Pang Cheong @ George Lim (George Lim) under
H a deed of trust dated 28 February 2011 ("trust deed").

[5] The plaintiffs' claim against all the defendants was for the return of the sum of RM35,087,135.06, or alternatively against the first, third and fourth defendants for the return of the sum of RM15,500, RM11,750,000 and RM3,500,000 respectively, as well as other incidental reliefs.
I

The Facts In Brief

[6] George Lim obtained a judgment against the plaintiffs in the 2007 suit at the Kuala Lumpur High Court for the sum of RM23,413,034.65 with interest at 8% per annum until full payment on 29 November 2009. At the time the High Court delivered its decision George Lim was already a bankrupt. The plaintiffs lodged an appeal of the 2007 suit to this court.

[7] As a condition of an interim stay of execution, the judgment sum together with accrued interest amounting to RM34,989.978.47 was deposited with a stakeholder, Messrs Zul Rafique & Partners. The High Court later refused a stay of execution at the hearing of the stay application made by the plaintiffs. The plaintiffs however obtained an interim *ex parte* stay at the Court of Appeal.

[8] On 28 February 2011, the Court of Appeal at the *inter partes* hearing however dismissed the plaintiffs' stay application. Subsequent to that the judgment sum held by the stakeholders including the accrued interest in all amounting to RM35,087,135.06 was released to the solicitor of George Lim, the firm. The monies was paid into the firm's client's account with RHB Bank.

[9] At or about the same time with the release of the money by the stakeholder, the third defendant had prepared the trust deed. It is to be noted that the trust deed bears the same date (28 February 2011) as the date the Court of Appeal refused the stay and the monies paid to the third defendant as stakeholder for George Lim. Under this trust deed the fifth defendant purportedly acts as trustee for George Lim for the released judgment sum.

[10] On 7 July 2011, this court allowed the plaintiffs' appeal against the High Court decision in the 2007 suit, and set aside the High Court judgment. Consequently this court ordered the restitution of the judgment sum to the plaintiffs.

[11] Between the date of the release of the judgment sum to the firm by the stakeholder and the date this court allowed the plaintiffs' appeal various related events had taken place.

[12] In a related subsequent development, the plaintiffs had on 2 March 2011 obtained *ex parte* preservation order from the Federal Court (*vide* Federal Court Application No. 08-79-2011(w) to prevent George Lim or his servants or agent from disposing, dissipating or dealing with the judgment sum released to the firm. However, this preservation order was set aside upon the dismissal of the abovementioned plaintiffs' application by the Federal Court on 9 March 2011.

[13] Leave for contempt proceedings was obtained from the Federal Court on 19 May 2011, on the allegation that George Lim had lied in his affidavit opposing the plaintiffs' preservation application. It was alleged that the released judgment sum had been disbursed prior to the service of the *ex parte*

preservation order. The allegation against the other proposed contemnors was for aiding and abetting George Lim. The Federal Court found that as a matter of fact, the released judgment sum had indeed been paid out and cleared from RHB account one day prior to the service of the notice of *ex parte* preservation order on the defendants. Therefore the question of breach of the order did not arise. The plaintiffs hence did not succeed in the contempt proceedings.

[14] George Lim was adjudged a bankrupt on bankruptcy proceedings instituted by the plaintiffs on 8 November 2011. In another related development also, on 27 April 2012 George Lim was adjudged by the Kuala Lumpur High Court as mentally disordered under the provision of the Mental Health 2001 on an application by his son, Gary Lim Ting Howe.

Issues Before The High Court

[15] At the trial before the High Court, the plaintiffs filed a claim against all the defendants seeking to hold all the defendants liable for the judgment sum released or alternatively to hold the defendants liable to account for monies received by each of them. The following issues were canvassed before the High Court:

(a) Plaintiffs' Issues

(1) Whether the Plaintiff's appeal to the Court of Appeal *vide* Civil Appeal No. W-02-3441-2010 against the Judgment dated 29.11.2010 obtained by George Lim against the Plaintiff in the 2007 suit:

(i) was a continuation of proceedings before this Honourable Court; and

(ii) constituted a *lis pendens* which was impressed upon the Judgment sum of RM35,087,135.06 and which bound the Defendant herein.

(2) Whether D1 to D4 are and were at all material times constructive trustees of the Judgment Sum of RM35,087,135.06 holding the same for the Plaintiffs.

(3) Whether D1 to D4 have obtained for themselves or others a wrongful gain and thereby enriched themselves at the expense of the Plaintiffs and thus obliged to disgorge to the Plaintiffs the sums received by each of them out of the Judgment Sum of RM35,087,135.06.

(4) Whether D5 is liable as an accessory for dishonestly assisting a breach of trust by D1 to D4.

(b) Defendants' Issues

(5) Whether George Lim was entitled absolutely to the monies paid towards satisfaction of the Judgment dated 29.11.2010 that was paid after the dismissal of application for stay of the Judgment and without any qualification.

(6) Whether the Order of the Court of Appeal dated 7.7.2011 in Civil Appeal No. W-02-3441-2010 ordering George Lim to pay the Plaintiffs the monies released towards satisfaction of the Judgment and interest accrued thereon ("the Restitution Order") would provide the Plaintiffs a right *in personam* against George Lim and not otherwise.

(7) Whether the Plaintiffs have enforced the said right *in personam* by applying for and obtaining a receiving order and adjudication order pursuant to the Bankruptcy Act 1967 on 8.11.2011.

(8) Whether by the action herein, the Plaintiffs are seeking undue preference over the creditors of George Lim.

Findings Of The High Court

[16] On the above issues, the learned High Court Judge concluded her findings in her grounds of judgment as follows:

(a) the plaintiffs' appeal (of the 2007 suit) to the Court of Appeal is a continuation of proceedings before the High Court but the plaintiffs have relied on the wrong basis ie, *lis pendens* to establish a claim of breach of constructive trust and unjust enrichment by the defendants;

(b) the plaintiffs would have to establish that a constructive trust arises when the judgment sums was paid to the defendants and the defendants should hold the monies on trust for the benefit of the plaintiffs who are the beneficiaries to the trust, and not for the benefit of the defendants or for other persons, and the proper test to be applied is whether the equitable remedy of constructive trust can be available to the plaintiffs based on applicable principles of equity and good conscience which impose a trust on the person who acquires the property to hold it for the benefit of the beneficiaries;

(c) on the pleadings the defendants cannot raise the issue of plaintiff's *locus standi* to commence and maintain the suit against the defendants - the issue was never pleaded;

(d) agreed with the plaintiffs' submission that the circumstances under which the judgment sum was dealt with or disbursed are rather suspicious, and the defendants appeared to have acted in great haste;

(e) the plaintiffs have not adduced any evidence to dispute the fact that there is in existence a trust deed dated 28 February 2011 which was duly executed and stamped and that when this court dismissed the plaintiffs' application for stay of execution, at that point of time, George Lim was entitled to the monies from the judgment sum and the monies were at his free disposal;

(f) the fifth defendant had acted in accordance with the terms of the trust deed when he disbursed the trust fund and there is no convincing evidence that the fifth defendant has been accessory for dishonestly assisting the first to the fourth defendants to put the judgment sum beyond the reach of the plaintiffs;

(g) the plaintiffs also failed to show exactly how the first to fourth defendants had acted in concert to bring the trust deed into existence with a common objective, to cause wrongful loss to the plaintiffs; and the trust deed is not a sham and that George Lim as the settlor had the intention to give effect to the trust. There was also no action taken by the plaintiffs to declare the trust deed to be null and void;

Grounds Of Appeal

[17] The plaintiffs advanced two main grounds of complaint against the judgment of the High Court. The first complaint was that the learned trial judge had erred in law in failing to judicially appreciate the totality of the evidence before her when holding that the two documents ie, the trust deed and the bill for professional fees were validly made. The second complaint was that she misdirected herself in law in holding that the plaintiffs' claim under a constructive trust and for unjust enrichment had not been made out.

[18] The entire basis of the defence case rests on two (2) documents, the trust deed dated 28 February 2011 and the bill for professional fees dated 3 December 2010. The learned trial judge, in holding that the trust deed was validly executed, had preferred the documents of trust and the bill as evidence and rejected circumstantial evidence relied by the plaintiffs to impeach the validity of these documents. In our view the learned trial judge misdirected herself in doing so. Had the learned judge not misdirected herself she would have agreed that the trust deed and the bill should in fact be scrutinised against the circumstantial evidence adduced before her. Had such analysis been undertaken, she would have come to a different conclusion. We say so, because at para. 77 of her judgment the learned trial judge said "... I agree that the circumstances under which the judgment sum was dealt with or disbursed are rather suspicious, and the defendants appear to have acted in great haste". And she narrated the events in support of that finding as enumerated in para. 77 of her judgment, from the evidence before her *viz*;

(i) the fourth defendant on 17 December 2010 already knew that the fixed deposit in the hands of Zul Rafique & Partners, the stakeholders, was held in RHB, KLCC branch. (notes of evidence at p. 30 and also CBOD2 Pt B pp. 333 to 334);

(ii) the fourth defendant on 21 January 201 had opened a client's account of the firm with the same RHB KLCC branch on 21 January 2011 accordingly on the instruction of the second defendant;

(iii) the fourth defendant agreed that the purpose of opening the account at the very same branch was to facilitate the receipt of the monies once the stay was refused;

(iv) the judgment sum was collected and was banked into firm's client's account with RHB, KLCC branch on the next day (1 March 2011) after the stay of execution was refused on 28 February 2011. A day after (by 2 March 2011) the whole RM35 million had been taken out; and

(v) the sum of RM35 million was disbursed very quickly. Out of which RM3.5 million was taken out in physical cash, and the balance RM31.5 million was sent as cash *via* a telegraphic transfer to the firm's client's account with PBB, Raja Chulan branch. From this PBB account, on cheques signed by D4, the following payments were made:

A. On 1 March 2011

Chua Lay Kim (first defendant)	RM5,5,500,000
Chua Lay Kim (first defendant)	RM10,000.000
Kumar Jaspal Quah & Aishah (third defendant) client's account	RM11,750,000

B. On 2 March 2011

Eugene Lim Ting Hian	RM1,000,000
Lisa Lim Siew Peng	RM 1,000,000
Gary Lim Ting Howe	RM1,250,000

C. The following payments were made out of the firm's client's account with PBB, Jalan Raja Chulan branch:

Soh Siew Eng	RM150,000
Harpal Singh Grewal	RM100,000
Diana Chee Vun Hsai	RM100,000
David Thomas Mathew	RM150,000
George Lim	RM150,000

[19] The first defendant (wife of the second defendant) was paid an aggregate sum of RM27.25 million. In her further and better particulars she said RM7,500,000 was meant for the benefit of the firm and she did so on an oral nomination and authorisation given by her husband (the second defendant) to receive this sum.

[20] She was further purportedly given a written nomination and authorisation by Pyramid Prestige Sdn Bhd which beneficially entitled to the sum of RM8,000,000 as well as CHS Fire Ltd which was entitled to a sum of RM11,750,000.

[21] As a result the trust was denuded of its corpus within two days. The second defendant when asked why the hurry in disposing the money gave the reason that his client George Lim had waited since December, the amount being so substantial would attract a good interest per day. However, as it turned out not all the judgment sum went to George Lim.

[22] We agree with the observation and findings of the learned judge that these circumstances as cited and observed by her above had caused suspicion in her mind. The learned judge having observed so ought to have scrutinised the trust deed against the above circumstances and suspicion, instead.

[23] According to the terms of the trust deed, under cl. 2.3 the trust was to take effect the moment the monies came into the firm's client's account. That being the effective date of the trust as provided under the said clause in the following terms:

> 2.3 The Settlor hereby declares that upon either the Settlor or the Solicitors receiving the Judgment Sum pursuant to the Judgment, the Trust shall come into effect immediately and shall be absolute and irrevocable.

[24] The monies that came from Messrs Zul Rafique & Partners' account at RHB Bank Berhad in the KLCC branch went into the firm's client's account specially opened at RHB Bank's same branch, on 1 March 2011. Following the expressed term of 2.3 above the trust deed should take effect from the date the monies went into effect on 1 March 2011 (ie, upon receipt of the judgment sum by the settlor or solicitor).

[25] We agree with the submission by learned counsel for the plaintiffs that the insistence by the second and fourth defendants that the trust deed only took effect when the monies were moved into the firm's Public Bank's client's account shows that either cl. 2.3 was a mere dead letter or that the defendants were acting in violation of the said clause and were seeking an *ex post facto* justification for what they did to rationalise an otherwise irrational explanation. If cl. 2.3 is a dead letter, it follows that the trust deed is *prima facie* a sham and was never intended to be the document it was supposed to be. This fact was not given consideration by the learned trial judge.

[26] It must be noted that the trust deed was relied upon at every turn in the course of evidence to support all the payments made. The second defendant referred to cl. 10 of the trust deed to justify payment of the remuneration of the trustee. He referred to cl. 2.2 of the trust deed to contend that at the point the monies came into the RHB account, it was George Lim's money. He also relied on the trust deed for the transfer of the scheduled assets to the PBB account and relied on the third schedule to the trust deed as providing for payment of the legal fees of RM7.5 million. The fourth defendant also referred to the third schedule to the trust deed as providing for payment of the fees of RM7.5 million. The fifth defendant relied on cl. 2.1 of the trust

deed for the investments made and sub-para. VI for the payment made to Harpal Singh. As for the CHS Fire investment, the fifth defendant referred to sub-para. II of the trust deed.

[27] We agree with the submission of the appellants that the subsequent conduct of the parties in relation to the trust deed further reinforced an inference of a sham trust. This can be viewed from the following circumstances;

(a) the fifth defendant though familiar with the duties of a trustee did not maintain an account of the trust fund. And this is despite the requirement to do so in cl. 13.1. There was no evidence that the fifth defendant maintained the trust account through the firm as found by the learned trial judge. The fifth defendant in fact testified that the amount was too large a sum for him to be responsible for. He had in fact left everything to the second defendant. This indifference and careless attitude towards the administration of the trust escaped the learned judge's consideration;

(b) the Sunbow Cheras and Dynamic Code shares should vest in the fifth defendant as trustee as they no longer form part of settlor's estate since they were purchased with trust money. The fifth defendant had no reason to surrender them when called by the Director General of Insolvency. The fifth defendant in doing so had recognised that they were not trust property but were in truth the property of George Lim. This point was missed by the learned judge. The return of trust monies repaid by the children of George Lim upon George Lim's request do not run in tandem with the existence of a trust because a trust once completely constituted is irrevocable in the absence of such a power in the trust instrument. There was no such revocation power. (see *Snell's Equity* 32nd edn., p. 672, paras. 22 to 051);

(c) the settlor is divested of all control over the trust fund and the manner of its investment. The trustee alone has the power and discretion to make an investment. The duties and discretions of a trustee are non-delegable (see *Snell's Equity* 32nd edn, pp. 806 to 807). The fact that fifth defendant acted upon the dictation of George Lim is consistent with an existence of a trust. Had there been a trust deed fifth defendant would have to exercise his own discretion and not acted under dictation. The same situation also with the investment DW3 (the fifth defendant) who had invested in Sunbow Cheras because that was something decided by George Lim; and

(d) D5 had no control over how the sum of RM11.75 million paid for the CHS Fire Investment was returned (see note of evidence on 7 October 2014 at B-4, CB 794 & 795). This flies in the face of there being a true trust.

[28] In our view all the above circumstances had overwhelmingly supported a case of a sham trust. We agree with the learned judge that these are in the nature of circumstantial evidence. However, it has been judicially recognised that circumstantial evidence are good evidence and sometimes it can be better than direct evidence (see *PP v. Sarjit Kaur Najar Singh* [1998] 5 CLJ 609; [1998]1 MLJ 184, the Supreme Court Of India observed as follows:

> Circumstantial evidence can sometimes be stronger than direct evidence as there is no possibility of it being like a witness's testimony which may be lacking in truth or accuracy. In circumstantial evidence, the motives or acts speak for themselves, sometimes louder than the words of witness, without any embellishment

[29] In the circumstances of this case, it would not be possible to obtain any direct evidence to proof that the trust deed is a sham. The only possible direct evidence would be merely available through the confession of the very people who were acting in concert against the plaintiffs. Hence, the plaintiffs would have to inevitably depend on circumstantial evidence to prove their case (see *Vijay Kumar Arora v. State (NCT of Delhi)* [2010] 2 SCC 353).

[30] Learned counsel for the second defendant relied on Lewis on *Trust* 18th edn, to contend that for a trust to be a sham it must be shown that the intention was not to create trust but to give false impression to third parties of it. Thus, in deciding if a trust is a sham there must be shown dishonesty because great weight ought to be placed on the existence of a formal signed document. We find in weighing the evidence before her the learned trial judge had failed to evaluate the circumstantial evidence relied by the plaintiffs which we had earlier alluded to. The evidence surrounding *albeit* circumstantial, is indeed overwhelming to point to a sham trust. The learned judge misdirected in preferring written document to the circumstantial evidence because it is abundantly clear that there was no intention to create a trust but just to justify the pay out.

[31] The learned judge had also misdirected herself when Her Ladyship commented that there was no challenge to the trust deed as there was no application made to set aside the trust deed either by the appellant or the DGI. What is clear from the pleadings is that the plaintiff pleaded a sham trust. An allegation of sham puts into doubt the intention of parties. There would be no necessity for a separate action to challenge the validity of the trust deed.

[32] The next document impugned was the bill for professional fee which justified a payment of RM7,600,000 from the monies. This bill was contended to be a false bill by the plaintiffs. It is to be noted that the format of this bill did not conform to the format of all the other bills issued by the firm. Out of the RM7,600,000, RM7,500,000 was paid out of trust monies to the wife of the second defendant as authorised by the firm by way of an

oral authorisation given by her husband (the second defendant). The bill of RM7,600,000 was supposedly inclusive of tax. The second defendant however testified that the firm undertook to pay 6% tax from the RM1.6 million portion. The evidence of the trustee as DW3 was that RM100,000 payment to Diana Chee Vun Hsai was the balance after payment of RM7,500,000 to the first defendant from the sum of RM7,600,000. The learned judge in our view, failed to consider the evidence circumstancing this bill in holding that it was genuine. Had she considered them she would not come to that conclusion. The learned judge had failed to test the oral testimonies against the integrity of the documents challenged. Chang Ming Tat FJ in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229 had observed at p. 234.

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity ...

[33] George Lim ought to have testified to support the case of the defendants, he having being the best evidence for the defence. The first defendant also did not testify or attend court. Instead, her husband (the second defendant) testified on her behalf as well as for himself. The learned judge found that there was no legal requirement for the first defendant to do so, relying on *Ranbaxy (Malaysia) Sdn Bhd v. E.I Du Pont Nemours & Co* [2012] 9 CLJ 79 as well as the Federal Court case of *Tong Soon Tiong & Ors v. FA Securities Sdn Bhd* [2013] 2 CLJ 448. The Federal Court in *Tong Soon Tiong* had said so because the claim of the plaintiffs in that cases were similar (but for the amount), and the facts relied upon were identical for each plaintiff. Not so in the instant case. The allegations against each defendant is premised on different facts. There was no reason forwarded as to why the first defendant did not attend court. Her pleaded case was she was authorised to receive the monies. Her version on the sum of RM7.5 million was at variance with the second defendant. Learned counsel for the second defendant submitted that the bill was reasonable legal fees looking at the amount involved and it was never challenged. It is true that was no challenge on the bill, but who would be expected to do so in the circumstances. We are not also concerned with the amount but its genuiness.

[34] In *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751, the Federal Court in dealing with a witness who was fully conversant with facts but refrain from giving evidence had this to say:

> The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the Appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference. See *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33. See also *Jaafar bin Shaari & Anor (suing as Administrators of the Estate of Shofiah bte Ahmad, deceased) v. Tan Lip Eng & Anor* [1997] 3 MLJ 693 where Peh Swee Chin FCJ said "The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it". There are two other authorities that are of assistance on the point. In *Wisniewski v. Central Manchester Health Authority* [1998] PIQR 324, Brooke LJ when delivering the judgment of the Court of Appeal quoted from a number of authorities including the following passage from the speech of Lord Diplock in *Herrington v. British Railways Board* [1972] AC 877.

[35] The firm issued from its client's account the amount billed and the payment was made out in favour of the first defendant on the oral instruction of her husband, the second defendant. We find it strange that the fees of such a magnitude can end up in the hands of the first defendant. In our view the facts of this strange transaction is well within the knowledge of the first defendant. Although the first defendant may be entitled not to testify in the trial she would be in peril of having an adverse inference drawn against her because the circumstances require her explanation. (see *Wisniewski v. Central Manchester Health Authority* [1998] PIQR 324).

[36] There is no doubt that the court had been deprived of any positive evidence as to why such strange arrangement had been made over a bill of professional charges. This would also go to support the lack in the genuiness of the impugned trust deed. There may always be a legitimate tactical move under our adversarial system of litigation. A defendant who adopts it cannot however complain if the court draws from the fact which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.

[37] Brooke LJ in *Wisniewski v. Central Manchester Health Authority* [1998] PIQR 324 had observed from the line of authorities on this issue that in certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action. If such inference was drawn it strengthen the evidence adduced by the other party. The desired

inference can only be drawn upon some evidence adduced on the matter in question. However, if the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given the potentially detriment of the absence or silence may be reduced or nullified. In the light of all the circumstantial evidence raised by the plaintiffs in this case we agree that the absence of these witnesses go to strengthen the case of the plaintiffs on the facts and circumstances of this case.

[38] In our view taking the evidence as a whole they sufficiently raised issues to give rise to a sham trust. We agree that the circumstances, the speed of pay out and the conduct of the defendants viewed as a whole had succeeded to impeach the genuiness of both the trust deed and the bill. The learned judge ought to have taken the exercise of scrutinising these evidence against the written documents. Had she done so and with suspicion that she has, she would come to a different conclusion.

[39] As the crux of the whole defence had placed total reliance for the various payment solely on the strength of the these impugned documents, we agree with learned counsel for the plaintiffs that they had been wrongfully deprived of the judgment sum.

[40] From the facts underlined above it can further be inferred that all the defendants were engaged in the dissipation of the monies. The firm where both the second and fourth defendants were members prepared the sham trust deed as well as the impugned bill. Both these two documents had expedited the speed by which the monies move. The share sale agreement for Dynamic Code Sdn Bhd was also prepared by the third defendant's firm. The single largest beneficiary of the monies, the first defendant could not have received all the monies but for the acts of both the second and the fourth defendants. The second defendant in fact was the one who instructed for the opening of the RHB Bank KLCC branch. The monies from the public account was drawn out through cheques signed by the second defendant. Whilst the fifth defendant who was purportedly a trustee had been lackadaisical of his function as a trustee and exercised no control whatsoever over the trust. He was also a party to the disbursement of the monies by authorising vouchers. These linkages and conduct proved that they were all in cahoots to deprive the plaintiffs of their monies. These in our view sufficiently showed that the defendants were acting in concert with each other and should be held liable for the wrongful loss perpetrated on the plaintiffs.

Restitution

[41] The next issue to be considered is what would be the consequences in a situation like ours wherein the appeal was allowed and the judgment of the High Court for RM35,087,135.06 was set aside. In our view, the principle is when a judgment is set aside then the court must put right the position of parties by ordering restitution. The *status quo* of parties must be restored to

A the position prior to the impugned judgment being granted. In other words, the court is seised with inherent jurisdiction to restore parties to *status quo ante*. In our particular case that would mean ordering the judgment sum to be refunded to the plaintiffs. That in our view is the general position in law and this principle has been succinctly dealt with in the case of *Malacca Malay* B *Guru2 Co-operative Thrift & Loan Society Ltd v. Tan Mei Hua & Ors* [1970] 1 LNS 77; [1971] 1 MLJ 107 which was relied upon by counsel for the plaintiffs and to the judgment of Sharma J which we now quote (and we agree) at p. 109:

> The jurisdiction to make restitution is inherent in every Court and is exercised whenever the justice of the case demands it. (See *Jai Berhm v.* C *Kedar Nath Marwari* 49 IA 351; AIR 1922 PC 1; 24 LT 111, *Prayag Narain v. Kamekhea* 36 IA 97.) In *Lala Bhagwan Das v. Lata Kishen Das* [1953] SCR 559 the Supreme Court of India put the matter thus:
>
> > On the reversal of a judgment, the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had D lost and that it is the duty of the Court to enforce that obligation unless it is shown that restitution would be purely contrary to the real justice of the case.
>
> The underlying principle is that when the main judgment or order is varied or reversed, all orders consequential or depending upon it are affected and E wrongs done under them have to be righted by granting restitution. In order to do this the Court may make any order including an order for the refund of costs or the payment of interest, damages, compensation or mesne profits as may properly be consequential on such variation or reversal of the order.
>
> F In view of what I have already said and in the light of the facts and the orders of the Court dated 25 August 1967 and 29 August 1969 the plaintiffs had no right to issue the writ of seizure and sale against the third defendants. The writ of seizure and sale is consequently set aside. The third defendants are also entitled to be restored to *status quo* ante in consequence of the setting aside of the writ of seizure and sale and the G plaintiffs are ordered to repay the sum of $5,600 to the third defendants. In the case of *Rodger v. Comptori D'Escompte de Paris* [1871] 40 LJPC 1; 24 LT 111 already cited, their Lordships of the Privy Council observed that:
>
> > the perfect judicial determination, which it must be the object of all Courts to arrive at, will not have been arrived at unless the H persons who have had their money improperly taken from them have the money restored to them with interest during the time that the money has been withheld.

(see also Golf & Jones, *The Law of Restitution* 6th edn and in particular chap. 16 on the Recovery of Benefits Conferred Under Judgments or Orders I Subsequently Reversed or Set Aside).

[42] At first blush that position in law is fairly straightforward and would mean the defendant ie, George Lim should be ordered to pay the judgment sum. In fact, counsel for the defendants took that position but bearing in

mind that George Lim is a bankrupt (a fact not in dispute) and until recently was subject to orders made against him under the Mental Health Act, that would probably be a fruitless exercise hence the plaintiffs' present cause of action.

[43] We note that the general principle in law is that restitution can only be ordered against the party to the judgment, in this case George Lim. The successful plaintiffs must therefore proceed directly against any third party which the plaintiffs have done in this case. The question that now arises for our consideration is whether the plaintiffs can sustain a plea of constructive trust and a deliberate disregard of the plaintiffs' interest to *Restitutio in Integrum*. We refer to the case of *Montagu's Settlement Trusts, Re, Duke of Manchester v. National Westminster Bank Ltd* [1992] 4 All ER 308 where the court approach the issue on the basis of equity imposing a trust upon the defendants. In the said case, it was held and we quote:

> Held - where it was alleged that a person was a constructive trustee because he had received trust property knowing it to be so, the fundamental question to be determined was whether the conscience of the recipient was bound in such a way as to justify the imposition of a trust on him. Whether a constructive trust arose depended primarily on the knowledge of the recipient and not on whether he had received actual, constructive or imputed notice that the property was trust property. The relevant knowledge which would make a recipient of trust property a constructive trustee was actual knowledge that the property was trust property, or knowledge which would have been acquired but for ignoring the obvious or wilfully and recklessly failing to make such inquiries as a reasonable and honest man would have made, since in such cases there was a want of probity which justified imposing a constructive trust. However, it was doubtful whether carelessness in making or failing to make such inquiries as a reasonable and honest man would have made amounted to a sufficient want of probity to justify the a imposition of a constructive trust on the recipient, or whether knowledge could be imputed to the recipient so as to fix him with the knowledge of his solicitor.
>
> On the facts, the tenth duke did not become a constructive trustee of any of the settled chattels because at the relevant time he did not have the requisite knowledge that the transfer of all the chattels to him was a breach of trust or in any way improper and any knowledge that his solicitor had was not to be imputed to him.

At p. 323 to 324 of the judgment, Sir Robert Megarry VC said and we quote:

> Third, there seems to me to be a fundamental difference between the questions that arise in respect of the doctrine of purchaser without notice and constructive trusts. As I said in my previous judgment (see p 320, *ante*):
>
> > The former is concerned with the question whether a person takes property subject to or free from some equity. The latter is concerned with whether or not a person is to have imposed upon

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> him the personal burdens and obligations of trusteeship. I do not see why one of the touchstones for determining the burdens on property should be the same as that for deciding whether to impose a personal obligation on a man. The cold calculus of constructive and imputed notice does not seem to me to be an appropriate instrument for deciding whether a man's conscience is
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> sufficiently affected for it to be right to bind him by the obligations of a constructive trustee.

I can see no reason to resile from that statement, save that to meet possible susceptibilities I would alter 'man' to 'person'. I would only add that there is more to being made a trustee than merely taking property
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subject to an equity.

There is a further consideration. There is today something of a tendency in equity to put less emphasis on detailed rules that have emerged from the cases and more weight on the underlying principles that engendered those rules, treating the rules less as rules requiring complete compliance,
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and more as guidelines to assist the court in applying the principles. A good illustration of this approach is to be found in the judgment of Oliver J in *Taylors Fashions Ltd v. Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897 at 910-918, [1982] QB 133 at 145-155. This view was adopted by Robert Goff J in *Amalgamated Investment and Property Co Ltd v. Texas Commerce International Bank Ltd* [1981] 1 All ER 923 at 926, [1982] QB 84
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at 104-105, and it was, I think, accepted, though not cited, by the Court of Appeal in the latter case (see [1981] 3 All ER 577, [1982] QB 84 at 116). Certainly it was approved in terms by the Court of Appeal in *Habib Bank Ltd v. Habib Bank AG Zurich* [1981] 2 All ER 650 at 666, 668, [1981] 1 WLR 1265 at 1285, 1287. The *Taylor Fashions* case concerned equitable estoppel and the five *probanda* to be found in the judgment of Fry J in *Willmott*
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v. Barber (1880) 15 Ch D 96 at 105 and on the facts of the case before him Oliver J concluded that the question was not whether each of those *probanda* had been satisfied but whether it would be unconscionable for the defendants to take advantage of the mistake there in question. Accordingly, although I readily approach the five categories of knowledge set out in the *Baden* case as useful guides, I regard them primarily as aids
G
in determining whether or not the duke's conscience was affected in such a way as to require him to hold any or all of the chattels that he received on a constructive trust.

There is one further general consideration that I should mention, and that is that 'the court should not be astute to impute knowledge where no
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actual knowledge exists': see the *Baden* case (at 242). This approach goes back at least as far as *Barnes v. Addy* (1874) LR 9 Ch App 244 at 251-252. The view of James LJ was that the court had in some cases:

> gone to the very verge of justice in making good to *cestuis que* trust the consequences of the breaches of trust of their trustees at the
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> expense of persons perfectly honest, but who have been, in some more or less degree, injudicious.

Further at p. 330:

> *Whether a constructive trust arises in such a case primarily depends on the knowledge of the recipient, and not on notice to him; and for clarity it is desirable to use the word 'knowledge' and avoid the word 'notice' in such cases. For this purpose, knowledge is not confined to actual knowledge, but includes at least types (ii) and (iii) of Baden knowledge, i.e. actual knowledge that would have been acquired but for shutting one's eyes to the obvious or wilfully and recklessly failing to make such inquiries as a reasonable and honest man would make; for in such cases there is a want of probity which justifies imposing a constructive trust.*
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> (emphasis added)

[44] In the recent Federal Court decision of *CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals* [2014] 3 CLJ 1, the Federal Court had (in para. 143) in its judgment opined as to the principle of dishonesty or of consciously acting improperly, and the Federal Court referred to the aforesaid case, *Montagu's Settlement Trusts, Re, Duke of Manchester v. National Westminster Bank Ltd and others* (*supra*).

[45] We also refer to the case *Bank of Credit and Commerce International (Overseas) Ltd v. Akindele* [2000] 4 All ER 221 where Lord Justice Nourse sets out in his grounds of judgment at p. 455 and we quote (and agree):

> All that is necessary is that the **recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt.**
>
> For these reasons I have come to the view that, just as there is now a single test of dishonesty for knowing assistance, so ought there to be a single test of knowledge for knowing receipt. **The recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt.** A test in that form, though it cannot, any more than any other, avoid difficulties of application, ought to avoid those of definition and allocation to which the previous categorisations have led. Moreover, it should better enable the courts to give common sense decisions in the commercial context in which claims in knowing receipt are now frequently made, paying equal regard to the wisdom of Lindley LJ on the one hand and of Richardson J on the other.
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> (emphasis added)

[46] It is clear from both of these cases that equity imposes a constructive trust and breach of fiduciary duty on the defendants, in cases where it becomes unconscionable for the defendants to continue to retain the benefit of the trust. Whilst we note that before the reversal of the judgment on appeal, George Lim was entitled to enjoy the fruits of his judgment which he had obtained, the question of whether this right must be balanced against a scheme that is created purely to defeat the right of the plaintiffs in this case to restitution. The law would impose an obligation of constructive trusts on the defendants primarily on the basis that it would be unconscionable for the defendants to retain the benefits that they have obtained under the settlement of trusts.

[47] Bearing in mind that George Lim acted on the strength of his judgment that he had obtained, the principle of constructive trusts could only apply in our view under the given circumstances ie, (a) the settlement of trusts was put in place for the predominant purpose of defeating the right of the plaintiffs to restitution under the given circumstances and on the facts and evidence presented before the court and (b) whether it would be conscionable to allow the first to the fourth defendants to retain the benefit that each of them have obtained under the said trust.

[48] Turning now to the specific payments being impugned by the plaintiffs. We have besides the trust deed and we are of the view that it is a sham, the bill raised in favour of the firm dated 3 March 2010. As we have earlier alluded to, a careful scrutiny of the bill will show that it was essentially for counsel fees for the second defendant. We had earlier noted that this bill was purportedly paid from the proceeds of the judgment sum lying in the trust account of the firm. Based on the principles of unconscionability that we discussed earlier we note that the second defendant and the firm have been aware of the right of restitution as the second defendant was the counsel in this case. However, the aforesaid bill appeared to have been settled with undue speed.

[49] As we have alluded to earlier, the firm issued from its client's account the amount billed and the payment was made out in favour of the first defendant on the oral instructions of her husband, the second defendant. It is not in dispute that the first defendant is the wife of the second defendant. We find it strange that fees of such a magnitude can end up in the hands of the first defendant and that the first defendant did not deem fit to explain.

[50] The next point to be considered is who authorised this payment from the trust account of the firm. We note that only George Lim could have done so and George Lim was again not called to give evidence. The learned trial judge found that there was no necessity to have called George Lim but in our view George Lim being the client was the only person who could have authorised the firm to issue payment in the manner that it was issued and therefore his testimony was essential to the case. We are not in agreement with the observation by the learned judge for reasons we have discussed in the preceding paragraphs.

[51] We therefore agree with counsel for the plaintiffs that it is clear that looking at the evidence as a whole, we find the irresistible conclusion to be drawn in this case was the payment of the said bill was for the predominant purpose of defeating the plaintiffs' right of restitution. We took into account the following factors:

(a) the haste in which this bill was settled and the arrangement was between the second defendant and the firm;

(b) the authorisation from George Lim to approve this payment was absent;

(c) George Lim had not met the first defendant or knew her (see Minit Mesyuarat Pemiutang dated 9 February 2012 at p. 3881 AR Jilid C-27); and

(d) the whole exercise was driven by the firm and the second defendant who would have been aware of the plaintiffs' right of restitution.

[52] We refer to the decision of the Federal Court in *Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors* [2013] 5 CLJ 949 and to the judgment of His Lordship Suriyadi Halim Omar FCJ, in particular para. 37 of the judgment of the court which we quote and agree:

> From the various opinions above it may be construed that a constructive trust arises by operation of law irrespective of the intention of the parties, *in circumstances where the trustee acquires property for the benefit of the beneficiary, and making it unconscionable for him to assert his own beneficial interest in the property and deny the beneficial interest of another. Being bereft of any beneficial interest, and with equity fastened upon his conscience, he cannot transfer any interest to himself let alone a third party. If he does, then a constructive trust comes into existence. An aggrieved party, by equitable remedy, may demand restitution of the property if he has been deprived of his beneficial interest.*
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> (emphasis added)

[53] The learned judge in her grounds of judgment dealt with this issue of the bill of RM7.6 million but did not consider nor appreciate the totality of the evidence pointing to the unconscionable conduct of the first and second defendants and the firm. The learned judge had in fact misdirected herself in finding there was no concrete and satisfactory evidence to make any conclusive finding, based on the suspicion of the plaintiff. The plaintiffs' case is grounded on the evidence before the court oral and documentary and not pivoted on mere suspicion. By failing to consider the totality of the evidence, which points to the unconscionable conduct, the learned judge has misdirected herself which calls for appellate intervention.

[54] In the circumstances of the case, we therefore find that it would be unconscionable to allow the first defendant and second defendant to benefit from receipt of this payment. In the result, we allow the plaintiffs' appeal as per prayer in paras. 1 and 2 of the plaintiffs' statement of claim with costs and we set aside the order made by the High Court. We award global costs RM20,000 against all defendants/respondents jointly and severally. Deposit to be refunded.

[55] Before we end, we would like to record our appreciation to all the counsels for their able submission. As the chairman of this panel, I would also like to record my appreciation to both my learned brother and sister for their immense contribution in the preparation of this judgment.